

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DANIEL S O'SHEA
(Claimant)

PRECEDENT
BENEFIT DECISION
NO. P-B-485
CASE NO. 97-06206

S.S.A. No.

PACIFIC BELL TELEPHONE
ATTN KATHLEEN LUM

EMPLOYER ACCOUNT NO.

OFFICE OF APPEALS NO. OAK-08897

DA-REV

The employer appealed from the decision of the administrative law judge which held the claimant was not disqualified from receiving benefits under section 1256 of the Unemployment Insurance Code and the employer's account was not relieved of benefit charges.

STATEMENT OF FACTS

The claimant worked for the employer from February 18, 1997 to March 10, 1997, as a service technician at a terminating wage rate of \$437 per week. He lost his job effective March 10, 1997 under the following circumstances.

On January 23, 1997, the claimant applied for work as a service technician. The position of service technician involves climbing telephone poles and working around high-tension electrical wires. The claimant submitted to a pre-employment drug screen on February 6, pursuant to the employer's Substance Abuse Policy, which provides that "all offers of employment will be contingent upon the applicant's successfully passing a urine

test for alcohol, illegal drugs and controlled substances." The claimant's test results came back positive for methamphetamines and amphetamines. The employer was notified of the positive result on or about February 11, 1997. An additional test was performed, which also came back positive.

The claimant represented to the employer that the positive result was due to a prescription drug he had been taking and that he would have his physician forward the information regarding the prescription drug to the company. Based on the claimant's representation, the employer offered the claimant employment, conditioned upon an adequate explanation of both the initial drug test and the confirming drug test by the physician prescribing the drug.

The claimant faxed to the employer a photocopy of the front and back of a generic over-the-counter asthma medication package. The claimant admitted to mistakenly referring to this product as a prescription drug but thought that the claim was reasonable inasmuch as the doctor had recommended it for a migraine headache for which the claimant was being treated approximately two days before the drug test.

The claimant also produced a hospital diagnosis dated February 5, 1997, which indicated only that the claimant had been diagnosed with "classic migraine" with no reference to any medication that might produce a positive test result. The asthma medicine would not have caused a false positive on a drug screen.

The claimant was terminated when it became apparent that he had no plausible alternative explanation for his positive test results.

REASONS FOR DECISION

The question we address in this case is whether the claimant was discharged for misconduct under section 1256 of the California Unemployment Insurance Code (UI Code). Section 1256 of the UI Code provides that an individual is disqualified from benefits if he or she has been discharged for misconduct connected with his or her most recent work. Sections 1030 and 1032 of the UI Code provide that the employer's reserve account shall be relieved of benefit charges if the claimant was discharged for misconduct. In Precedent Decision P-B-3, the California Unemployment Insurance Appeals board defined

"misconduct connected with work" as a substantial breach by the claimant of an important duty or obligation owed by the employer, willful or wanton in character, and tending to injure the employer.

The burden of showing a disqualification for misconduct under section 1256 is on the employer or the Employment Development Department (EDD or the Department). A claimant is not required to show that he or she is not disqualified under that section. Prescod v. California Unemployment Insurance Appeals Board, (1976) 57 Cal.App.3d 29.

When the claimant gave a false explanation for the positive drug test results, the employer discharged the claimant for the positive results as well as for the claimant's misrepresentations concerning the result. Because we find that the claimant is disqualified under section 1256 of the UI Code by virtue of his misrepresentations regarding the positive drug test result, we express no view on whether the positive result could, in and of itself, provide the basis for a finding of misconduct.

Precedent Decision P-B-77 clearly establishes that knowingly providing a false answer on a job application constitutes misconduct. There, an employee of Wells Fargo Bank marked "No" in the space on his initial job application that asked whether he had ever been arrested. After the arrests were discovered the employee was discharged. The Appeals Board stated that "the claimant owed a duty to the employer to disclose his prior arrests. There was a substantial breach of that duty."

The Appeals Board's decision in P-B-77 was clarified in light of changes in the Labor Code by issuing Precedent Decision P-B-241. After P-B-77 was adopted, California Labor Code section 432.7 was passed into law. Section 432.7 prohibited an employer from requiring on an initial employment application any record of arrests or including any questions regarding arrest records. Thus, under facts very similar to those present in P-B-77, the Appeals Board found no misconduct in the applicant failing to disclose arrest records only because such inquiries were made illegal under Labor Code section 432.7. Thus, while providing false information on an application generally constitutes a breach of an applicant's duty to deal honestly with the employer, the information sought by the employer must be within the scope of legal and proper pre-employment screening.

In this case, there has been no allegation that the employer's pre-employment drug screening was improper or in violation of federal or state statutory or constitutional principles. Thus, we proceed with our analysis under the premise that the drug test was legally administered.

In Precedent Decision P-B-78 the claimant quit his position as a checker and bag boy in a food store after working only a few days because of pain caused by a back condition which had existed for several years. In his employment application he had denied any physical handicaps and any back or foot trouble. He would not have been hired if his responses had been truthful. The Appeals Board held that the claimant's deception was a fraud in the inception, voiding the employment contract and negating what would otherwise have been good cause for leaving employment.

In each of the Appeals Board's previous precedent decisions in this area, the applicant provided false information on the application form itself or failed to provide information that was specifically requested on the application. We face a slightly different situation in this case, where the claimant appears to have been completely truthful when answering the questions that were specifically asked on the written application, but then proceeded to represent that he had a prescription for a drug that was properly prescribed by a physician and that this prescription would cause a positive result on a drug screen. Inasmuch as the claimant was afforded ample opportunity to verify this representation and failed to do so, we conclude that the claimant's oral statements were willful misrepresentations made in an attempt to keep his job.

The purpose of the job application process is to give the employer an opportunity to determine the applicant's fitness and ability to do the work. We consider oral representations regarding issues raised by the employer to fall squarely within the scope of the application process. Therefore our previous decisions in P-B-77, P-B-78, and P-B-241 shall apply with equal force to oral representations made by the job applicant. Where those oral statements constitute willful misrepresentation, misconduct is established.

DECISION

The decision of the administrative law judge is reversed. The claimant was discharged for misconduct. Entitlement to benefits shall cease on the date this decision becomes final,

unless the claimant earns or has earned five times his weekly benefit amount in bona fide employment after March 7, 1997. The employer's reserve account is relieved of charges.

Sacramento, California, November 12, 1997.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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